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U.S. Citizenship
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Services

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FILE:

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Office: TEXAS SERVICE CENTER Date:

JAN 26 2010

IN RE:

Petitioner:

Beneficiary:


PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The director reopened the proceeding on the petitioner's motion, and again denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a fuel cell engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel, new witness letters, and other exhibits.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer --

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the petition on July 29, 2007. In a statement accompanying his initial submission, the petitioner stated:

I am now a Lead Fuel Cell Development Engineer with [REDACTED] which is [a] leader in the development of portable fuel cell technology for the U.S. Army. NanoDynamics Energy is the first company to develop, demonstrate, and deliver a portable, affordable, and fuel-flexible solid oxide fuel cell (SOFCs) system, which is used to equip our soldiers with a significantly improved alternative to heavy,

cumbersome batteries in the near future. . . . NanoDynamics Energy has developed a microtubular SOFC, Revolution 50 (Rev-50), with an extremely high power density and energy efficiency that has also demonstrated thermal shock tolerance and operational durability. . . . Now I am working on developing Rev-250, the next generation of Rev-50, which has the output power 5 times higher than the Rev 50. . . .

I am focusing on the research of optimizing anode and electrolyte materials for Re[v]-250. I am also responsible for testing fuel cell and stack evaluation. . . .

From August 2000 to December 2006, I worked with the Center for Innovative Fuel Cell and Battery Technologies, School of Materials Science and Engineer[ing] at Georgia Institute of Technology as a Research Assistant. . . . During this period, my research work included developing a novel low-temperature SOFC electrolyte material . . . , synthesizing nano-ceramic powers [sic] . . . using glycine nitrate combustion, and co-precipitation techniques, and preparing dense thin ceramic or composite film on porous substrate using different thin film techniques.

I also worked with the Energy Technology Division at Argonne National Laboratory as a Research Assistant during April 2002 to April 2005. . . . My research work with Argonne National Laboratory included developing high-temperature mixed ionic and electronic conductor membranes with high hydrogen permeability and good chemical stability, synthesizing perovskite structure proton conductors and research their electrochemical properties, and investigating the effect of sintering process on the microstructure and electrochemical properties of ceramic or ceramic-metal composites.

The intrinsic merit and national scope of fuel cell technology are not in dispute here. Such technology could lead to abundant, clean energy that would help to solve many of the environmental, economic, and even political issues that arise from our present reliance on fossil fuels. At the same time, however, the petitioner's involvement in fuel cell research is not, by itself, an automatic basis of eligibility. The petitioner must also establish that his impact and influence in that specialty sets him apart from his peers. The petitioner must show not only that fuel cell research is in the national interest, but also that it is in the national interest to ensure the petitioner's continued work in the field in the United States.

The petitioner submitted six witness letters. Five of the six witnesses have worked or studied at Georgia Institute of Technology (Georgia Tech) while the petitioner was a student there. The remaining witness is a staff scientist at Argonne National Laboratory (ANL), where the petitioner has also trained.

stated:

During his stay at Georgia Tech, [the petitioner] had been a key part of a productive research team in the Center for Innovative Fuel Cell and Battery Technologies. . . . [T]he primary obstruction for the wide use of fuel cells is the high cost. One way to resolve this problem is to lower the operation temperature which will require creating novel

electrolyte and electrode materials that are capable of efficiently utilizing hydrogen fuel even in the low temperature. Because of [the petitioner's] unique skills and thorough understanding about the functional material design, he quickly became a leader in the team. He proposed and verified a novel concept of using mixed proton-oxygen ion conductors as electrolyte and electrode materials for low temperature fuel cells. He also developed a new fabrication technique to make 15 μ m dense electrolyte thin film based on porous anode substrate even by using commercial micro size powders. Most recently, he discovered [a] series of materials doped BZCY as electrolytes that showed the highest conductivity and much higher fuel cell performance than that of known materials at 550°C. . . .

The membranes he developed [at ANL] not only are stable in high CO₂ containing atmospheres, but also can tolerate temperature as high as 900°C – the elevated temperature helps more hydrogen to be pushed through the membrane, accelerating the separating process. With this breakthrough in technology, he proved the possibility of hydrogen separation from CO₂ and H₂O containing gas mixtures using a mixed protonic-electronic conducting ceramic membrane, which enabled ANL to meet the ambitious goals that were established by the DOE [Department of Energy].

[redacted] who supervised the petitioner's work at Georgia Tech, stated:

[The petitioner] recently discovered a novel proton conductor . . . that proved to be a more suitable electrolyte material for use in low-temperature SOFCs than any other known solid electrolytes. . . . The outcome of this research will have immediate and profound implications for economically competitive SOFCs, hydrogen production/separation, reforming of biomass fuels, as well as other processes involving hydrogen/proton transport.

[redacted] also credited the petitioner with "[d]evelopment of mixed conductors as electrodes for proton conductor fuel cells," "[f]abrication of BZCY thin films using modified dry pressing technique," and "[d]evelopment of stable hydrogen separation membranes in various atmospheres."

[redacted] and a former adjunct professor at Georgia Tech, stated:

I first became acquainted with [the petitioner] when he joined a project . . . at Georgia Tech, for which I was providing advisory services as a consultant. . . . [The petitioner] made significant contributions to that project, and accomplished more in just a few months than the previous post-doctoral assistant on the project had accomplished in over half a year. . . .

He was the first to make a stable ceramic hydrogen separation membrane that works effectively in atmospheres containing high percentages of CO₂ and H₂O, and that

remains stable even at temperatures up to 900 degree[s] C. He was also the first to explore a single-phase mixed protonic-oxygen ionic conductor as the electrolyte for fuel cells, to use doped-BaPrO₃ as an improved cathode material for intermediate-temperature solid oxide fuel cells, and to discover a series of compositions of barium-zirconium-cerium-ytterbium oxide as solid electrolytes. . . . The results of these studies have significant implications for fuel cell commercialization, and will be greatly beneficial to the U.S.

[REDACTED] and Electrochemical Scientist at United Technologies Research Center, was a doctoral student at Georgia Tech when the petitioner arrived there. [REDACTED] stated that the petitioner “has found two kinds of new electrolyte materials that show much higher performance than that of existing materials at low temperature,” and “has developed an inexpensive and simple ceramic process in which both anode and electrolyte layers are co-fired in one step, while the anode can be further modified by a solution impregnation process.”

[REDACTED] at Johnson Research and Development Company, was also a doctoral student at Georgia Tech when the petitioner began his studies there. [REDACTED] stated that the petitioner “has achieved significantly in the design of inorganic materials and development of fabrication technology for functional devices and unique structures. He has found several new materials . . . which can be used as solid state ionic conductors and electrodes for electrochemical devices.”

[REDACTED], stated: “One of the critical issues in the membrane’s development is the chemical stability of membranes under operating conditions especially in CO₂ and H₂O. During his study at ANL, [the petitioner] dramatically increased the chemical stability of our membranes by developing new proton conducting materials.”

The petitioner submitted copies of his published articles, as well as copies of two articles containing citations to his work.

On September 10, 2008, the director instructed the petitioner to submit additional evidence, stating that the petitioner’s initial submission did not distinguish the petitioner from others performing similar research. In response, the petitioner stated: “I have indisputably established myself among a small elite group of leading international scientists who ha[ve] contributed substantially to this critical area of science.”

Several factors listed by the petitioner as evidence of his standing in the field may be construed as evidence of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii), but, as we have already noted, an alien can be “exceptional” without qualifying for the additional benefit of the national interest waiver. The petitioner noted that he has reviewed journal articles, but he has not shown that participation in peer review is a privilege rather than a more routine duty expected of researchers who wish to publish their own work.

The petitioner stated: “**Since 2006**, my first author journal papers have been widely cited on over **20 occasions** by other scientists worldwide.” The petitioner listed a total of 22 citations of four articles, with 10 citations of the most-cited article. Only three of these citations appeared before the petition’s July 2007 filing date.

The petitioner documents the impact factors of the journals that have published his work. The impact factor, however, is an average calculated from the citation rates of the articles in a given journal. An article does not gain impact by appearing in a high-impact journal. Rather, the aggregated impact of individual articles determines the impact of the journal. The petitioner has not shown that his own citation rate (averaging less than two citations per article, with most not cited at all) compares favorably with the journals’ impact factors.

The petitioner also stated that his work was the subject of several news reports from 2002 onward. He identified eight articles, and submitted copies of four of them. Most of the eight identified reports appeared in publications closely tied to the national laboratories, such as *Argonne News* and the *Federal Laboratory Consortium NewsLink*; as such, the articles essentially amounted to self-promotion rather than outside attention. Because the petitioner did not submit four of the identified articles, there is no evidence in the record that the articles discussed the petitioner or his work at any length.

The four submitted articles all relate to the development of a hydrogen transport membrane that can withstand temperatures of up to 900°C. The articles therefore appear to describe the same membrane mentioned in witnesses’ letters. The articles in the record do not mention the petitioner’s name, and as such they address, at best, the importance of the project rather than the petitioner’s individual contributions to those projects. The only direct reference to the petitioner is an uncaptioned photograph of a researcher using a computer. In a handwritten annotation, the petitioner states that he is the researcher in the photograph.

One article, from *Explorer*, ends with this sentence: “[REDACTED] developed the membrane with colleagues [REDACTED] and [REDACTED] in collaboration with [REDACTED] and [REDACTED] at the National Energy Technology Laboratory in Pittsburgh.” Thus, the article not only fails to name the petitioner, but also specifically credits other researchers with developing the membrane.

The director denied the petition on November 14, 2008, stating that the petitioner’s “achievements to date are notable, but as a whole the record does not persuasively establish that these accomplishments are of such unique significance that the labor certification requirement can be waived.”

On January 21, 2009, the petitioner filed a motion to reopen the proceeding. Counsel explained that, despite a timely change of address notice from the petitioner, the director had sent the denial notice to an outdated address, and therefore the petitioner was unable to file a timely appeal or motion.

The petitioner submitted copies of previously submitted materials and updated citation information showing over 30 citations of his work. The petitioner also submitted copies of five “media articles.”

Some of these articles duplicate prior submissions. Others were named on the petitioner's earlier list but not submitted until the petitioner's motion. Two of the articles are identical, indicating that some outlets simply reproduced an ANL press release. One of the newly submitted articles repeated the list of six researchers credited with developing the hydrogen transport membrane. The authors of these articles, even the authors of Argonne's own press releases and in-house newsletters, clearly did not consider the petitioner to be among the major contributors to the project.

The "media articles" focused heavily on the petitioner's now-completed work at Argonne National Laboratory. The record contains no evidence that his subsequent activities have attracted comparable attention. Because the waiver is intended to secure prospective benefit to the United States, and not merely to reward an alien's past work, this point is not a trivial one.

The director granted the petitioner's motion to reopen, and again denied the petition on April 24, 2009. The director found that the record did not show the "significant impact" of the petitioner's work, stating that, at best, the record established the petitioner's "potential" for making such contributions in the future.

The petitioner appealed the decision on May 27, 2009. On appeal, counsel quotes extensively from witness letters and points to an increasing citation rate of the petitioner's published work. An updated citation list shows 61 independent citations of his work. It remains that only three of these citations had appeared at the time of filing. Therefore, the subsequent citations do not continue a pattern of heavy citation that already existed at the time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The petitioner may not file a premature petition on the expectation that his eligibility will become apparent by the time of the final adjudication of the petition.

The petitioner submits two new witness letters. [REDACTED] of the University of Pavia, Italy, states: "Although I have never met [the petitioner], I have closely followed [the petitioner's] research and [am] very impressed by the work he has done in the field of proton conductor materials and Solid Oxide Fuel Cells." [REDACTED] devotes much of his letter to the petitioner's most recent work, published after the petition's filing date.

[REDACTED] of the University of Maryland states that the petitioner "is one of very few fuel cell scientists today that is able to integrate both engineering approaches and scientific models in order to probe basic energy questions. His discoveries in low temperature fuel cells provide invaluable tools for industrial and military applications." The record contains no evidence from "industrial and military" sources to show the implementation of the petitioner's work.

Clearly, the petitioner's work has not gone unnoticed in the scientific community. At the same time, because the petitioner has devoted his career to fuel cell engineering and research, it is not surprising that his work has resulted in improvements to fuel cell technology. The petitioner has established that

he is active in what is, overall, an important area of endeavor, but he has not shown how his work sets him apart from others in that area. It cannot suffice simply to list his achievements and then declare them to be important. The materials in the record that single out the petitioner's contributions tend to be those that were created especially for submission with the petition.

Counsel argues that the petitioner "had indisputably established himself among a small elite group of leading scientists who have contributed substantially to this critical area of science." This assertion is highly debatable, and counsel cannot avoid or foreclose that debate simply by labeling the proposition "indisputable." There is evidence that the petitioner's reputation has grown in the years since he filed his petition, but the evidence does not persuasively show that the petitioner's eligibility was evident at the time he filed the petition. At best, the petition appears to have been filed prematurely.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.